first Accused then left with Tating and returned with a pink plastic bag which the first Accused handed to ASP Lim, and which was found to contain the cannabis. Considering these facts and circumstances as a whole, I have no doubt in my mind that the bargain struck between the second Accused and ASP Lim was about ganja, and that both he and the first Accused worked hand in hand in effectuating the purpose for which the bargain was struck, even though they each played a different role. In my judgment, the fact that the second Accused had requested ASP Lim for a deposit at the cemetery at which the delivery was agreed to be made, and the fact that the first Accused left after the second Accused had agreed to dispense with the down payment, and then came back with the pink plastic bag containing the cannabis are circumstances from which only one inference can be drawn, *viz*. that there was a common intention to traffic in the said dangerous drug and that the said act of trafficking, committed by the first Accused, was done in furtherance of that common intention. Therefore, the second Accused is liable for the act of trafficking committed by the first Accused in the same manner as if the act were committed by him alone by reason of the doctrine of joint liability laid down in s. 34 of the Penal Code. The evidence of the second Accused, which I have duly considered and rejected, has not raised any reasonable doubt in my mind as to the truth of the case for the reasons above stated, I find the two Accused guilty and convict them of the offence as charged.

PUBLIC PROSECUTOR

v.

SALIH BIN ABDUL RAJI

HIGH COURT, TAWAU
TUAN IAN H.C. CHIN JC
[CRIMINAL TRIAL NO. 18 OF 1987]
7 JUNE 1993

DANGEROUS DRUGS: Charge of trafficking - Defence evidence one of denial - Whether sufficient to rebut statutory presumption of possession - Whether defence has rebutted the presumption of trafficking.

CRIMINAL LAW & PROCEDURE: Sentencing - Age of accused - Whether age of accused stated in police report could be received in evidence as proof of age - Whether accused reply to questions as to his age inadmissible as being hearsay evidence.

The accused was charged with the offence of trafficking in 697.41 grammes of cannabis contrary to s. 39B(1)(a) of the Dangerous Drugs Act 1952. The accused was caught as a result of a police ambush and the police officers involved gave evidence to the effect that the accused was seen carrying the briefcase which was subsequently found to contain the cannabis.

The accused evidence was one of denial. He denied being in the vicinity of the catwalk, where the police officers stated they saw him, and he denied that he was carrying a briefcase or that he threw the briefcase away when the police officers identified themselves.

Held:

[1] The fact that the accused threw away the briefcase when confronted by the police officers clearly indicated that the accused was trying to rid himself of something which he knew was going to incriminate him. When this was considered together with the fact that the accused ran away after throwing the briefcase away, it was clear beyond doubt that the accused knew what was inside the briefcase.

[2] The unchallanged evidence of the accused did not rebut the presumption of knowledge nor did they raise any doubt as to the fact that the accused knew that there was cannabis inside the briefcase. The presumptions of possession and trafficking were not rebutted inspite of the fact that the accused may not have been the owner of the briefcase.

[3] Even if the entry in the Rekod Banduan as to the age of the accused could be admitted under s. 35 of the Evidence Act, the prosecution still had to prove the truth of the entry and could not use the accused's statement as to his age, such a statement being hearsay evidence of his age which was inadmissible in evidence. Furthermore statements of age in a charge sheet and a probation report are hearsay and cannot be evidence of proof of age.

[4] The learned DPP's argument that the accused was estopped by his own statement from disputing that he was 23 years old in 1986 was without foundation because principles of estoppel have no place in criminal law.

[5] The age of a person as at the time of examination could be determined with a reasonable degree of certainty by inspection by a physician specialist. There was no reason why this was not done in this case when there was no birth certificate to prove the age of the accused. It could not be said by looking at the accused that he could not be below 18 years old at the time he committed the offence. A doubt existed as to the true age of the accused which had to be resolved in favour of the accused.

[Accused convicted and ordered to be detained during the pleasure of the Yang Di-Pertua Negeri Sabah].

Cases referred to:
Dato Mokhtar bin Hashim v. PP [1983] 2 CLJ 10 / [1983] 2 MLJ 232 ***(cit)***
Tan Khay Seng v. Tan Kay Choon & Anor. [1990] 1 MLJ 51 ***(foll)***
PP v. Boy bin Islais[1993] 2 CLJ 470 / [1993] 1 AMR 19:766 at p. 777 ***(refd)***
Commissioner of the Municipality of Malacca v. Sinniah [1974] 1 MLJ 77 ***(cit)***
PP v. Lee Siew Ngock [1966] 1 MLJ 225 ***(refd)***
John Anak Liman & Anor. v. PP [1968] 2 MLJ 236 ***(refd)***
Ong Lai Kim & 2 Ors. v. PP [1991] 2 CLJ 1568 ***(not foll)***
PP v. Nur bin Hassan bin Salip Hashim & Anor. [1993] 2 CLJ 551 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 173(m)(2), 288(iv)
Dangerous Drugs Act 1952, ss. 39B(1)(a), (2)
Evidence Act 1950, ss. 35, 114(e),
Juvenile Courts Act 1947, s. 16
Sabah Prisons Regulations 1958, r. 136

Other sources referred to:
Mohan on the Law of Evidence in Malaysia, p. 206
Sarkar on Evidence, 13th Edn., p. 1078

For the public prosecutor - Hassan Abdul Ghani, DPP
For the accused - Paul Kan; M/s. Paul Kan & Co.

JUDGMENT

Ian H.C. Chin JC:

I. *The Charge*

The Accused, Salih bin Abdul Raji, is charged with the offence of trafficking in 697.41 grammes of cannabis on 6 October 1986 at 2.30 p.m. at Kampung Titingan, Tawau, in the State of Sabah, which is an offence under s. 39B(1)(a) and punishable with death under s. 39B(2) of the Dangerous Drugs Act 1952.

II. *Prosecution Evidence.*

After being told by a constable Stephen Tony Jarang ("PW8") that he had received information that a Filipino, wearing a white T-shirt with a word and a cartoon character printed on it, would be carrying cannabis in a briefcase in Kg. Titingan, Tawau, one Inspector Teh Cheng San ("PW2") on 6 October 1986 organised an ambush party comprising himself, PW8, one constable Hamzah Bukit ("PW3") and one corporal Gusibih Ladat (not called as a witness). All four of them proceeded in PW2's car to Kg. Titingan and they reached the place at 2.05 p.m. The four of them waited inside the car. PW2, PW3 and PW8 all testified that at 2.30 p.m. that day they saw the Accused, another person called Ismail bin Balris ("Ismail") and 2 others walking on a catwalk and that the accused was wearing the white T-shirt similar to the one described by the informer. They saw the Accused walking foremost, they saw him carry a briefcase and they saw all four persons walk towards their direction. The said four policemen then got out of their car and approached the Accused, Ismail and the other 2 persons. PW2 flashed his warrant card and said to them: "Kami polis, jangan lari". The Accused threw the briefcase away while Ismail just sat down. The Accused and the two other persons ran away in different directions. PW2 arrested Ismail and retrieved the briefcase which the Accused had thrown away. PW3 and PW8 chased after the Accused while the said Gusibih Ladat chased after the two other persons. Gusibih Ladat failed to arrest any of the two persons. PW3 and PW8 were able to arrest the Accused and the Accused was

brought to PW2 at about 2.45 p.m. PW2 opened the briefcase in the presence of the Accused and took out 13 plastic packets containing dried vegetable matter. The four policemen then returned to the police station taking with them the Accused and Ismail and with PW2 holding the briefcase. In the police station, PW2 weighed the 13 plastic packets and found their total weight to be 830 grammes. PW2 made a police report.

PW2 on the same day, that was 6 October 1986, at about 4.00 p.m., handed the briefcase with the 13 plastic packets containing the dried vegetable matter, the white T-shirt and a pair of blue jeans with a belt to one ASP Chester Chong ("PW4"), the investigation officer of this case. PW4 put all these items in his steel cabinet under lock until 11 October 1986 when he wrapped the briefcase with the 13 plastic packets containing the dried vegetable matter with a brown paper and placed the package (containing the briefcase and the 13 plastic packets with dried vegetable matter) in the steel cabinet under lock. On 15 October 1986 he took the package to Kota Kinabalu and handed the same to a chemist called Khalid Safan ("PW1") with a request that PW1 examine the dried vegetable matter. PW1, after examining the contents and rewrapping, kept the package under lock until 16 October 1986 when he took samples from the dried vegetable matter contained in the said 13 plastic packets. The 13 plastic packets containing the remaining dried vegetable matter were replaced in the briefcase and the briefcase after being re-wrapped was returned to the steel cabinet under lock until 7 November 1986 when PW4 came and collected the same from PW1. PW1 examined and analysed the samples of the dried vegetable matter and found them to be cannabis within the meaning of the Dangerous Drugs Act, 1952. PW4 kept the package that was returned to him by PW1 on 7 November 1986 under lock until 16 December 1986 when one ASP Heron Paul Berry ("PW5") took over duty from him and took over the custody of the said package, the white T-shirt and the blue jeans with a belt. The said package was kept there until 1 September 1992 when it was taken by PW5 to the police district headquarters of Tawau and there kept under lock. On 24 October 1992, one ASP Lim Teck On ("PW6") took over duty from PW5 and took custody of the package, the white T-shirt and the blue jeans with a belt. PW6 kept the same until 1 April 1993 when he handed the same to one Inspector Hamzah Ahmad ("PW7") who kept the same until they were produced in Court.

III. *Defence Evidence.*

The Accused an illegal immigrant from the Philippines entered Sabah in 1980 and went to Tawau in 1982. He applied for a one year "pass" (it cannot be ascertained what this document is) in April 1986 and obtained the same. In October 1986, he was staying in Kampung Icebox (a place known to be a haven for illegal immigrants and is also known as Kg Titingan), Tawau, in a rented house which he shared with his cousin called Sidang. He earned his living working as a cobbler and he claimed that by October, 1986, this "pass" was no longer valid. In the morning of 6 October 1986 he carried on his trade as a cobbler in Tawau town until about 12.00 p.m. when he went home to Kg. Icebox, Tawau. for his lunch and rest. After taking his lunch and rest, he went to the bus stop to catch a bus to return to the town but he did not bring any money with him and in fact he did not have any money because the last RM5 he had was the night before given to Sidang. At the bus stop he met his friend called Boy. Boy asked the Accused to wait for him as Boy wanted to go home to get money for the bus fares for both of them. It was while the Accused was waiting at the bus stop for Boy that he heard someone shout: "Tangkap pas". Upon hearing that he ran because his pass was by then not valid. Many other people were also running. He stopped to put back a shoe which had came off and it was at that moment that PW3 arrested him. He, in answer to a question by PW3 as to why he ran, said that he ran because he had no pass. He was later taken in a car with 3 other persons to the police station where PW3 showed him the briefcase for the first time and asked him who owns it; he replied he did not know. He claimed to have been beaten by the police at the police station. He was that night at 7.00 p.m. taken to his house where the police searched his house. The police repeatedly asked him as to whom the briefcase belongs to and he repeatedly said he did not know. The Accused also testified that one Inspector Alousius had asked him to admit but he had refused despite being hit by the said inspector. When shown the briefcase he

said he had never seen it before until it was produced in Court. As for the 13 plastic packets containing the dried vegetable matter, he said they were shown to him at the police station and that was the first time he had seen them. He denied being on the catwalk and he denied carrying the briefcase. He admits wearing the white T-shirt and the jeans.

Having already set out the evidence of both the prosecution and of the defence and with certain vital aspects in conflict, my next task is to find which version is the truth of the matter. It seems the Accused was setting up an alibi when he said he was not on the catwalk but somewhere else in a bus stop. But since the prosecution did not argue that it was, I will take it that it is not a defence of alibi but merely of being in a different but proximate place of the same area. The bus stop was not in any of the places shown in a plan produced in Court but the catwalk was shown.

IV. *Findings of Fact.*

Was the Accused ever on the catwalk carrying the briefcase that contained the cannabis? Did he throw the briefcase containing the cannabis away at the place described by the prosecution witnesses (PW2, PW3 and PW8)? Did the Accused run away after throwing down the briefcase containing the cannabis To find the answers, I will have to re-examine the prosecution evidence, the previous examination having been done just before I called for the defence, in view of the evidence of the Accused which if believed would mean that the Accused was never on the catwalk, that the Accused never carried the briefcase containing the cannabis and that he never threw the briefcase containing the cannabis away. The sighting of the Accused by the said PW2, PW3 and PW8 was through the gaps in two sides of a wooden fence. A *locus in quo* was held and it was demonstrated at the scene that one can see a person carry a briefcase through the gaps in the two sides of the wooden fences. Even though there was doubt as to whether it was possible for the said prosecution witnesses to have continuous sight of the Accused from the time on the catwalk to the time just before the policemen got out of the car in view of the fact that their vision may have been blocked by a pickup which was parked next to PW2's car and in between the said prosecution witnesses and the Accused, there is, nevertheless, still no doubt that the said prosecution witnesses were able to see the Accused after they had alighted from PW2's car. It was after the said prosecution witnesses had alighted from the car that they saw the accused, wearing the white T-shirt and jeans, throw the briefcase away and run. Therefore, even if the said prosecution witnesses had lost sight of the Accused because the pickup was blocking their vision, they again saw him very shortly after they had alighted from their car. I would accept as the truth the evidence of PW2, PW3 and PW8 that they saw the Accused carry the briefcase which contained cannabis, that the Accused threw the briefcase away after PW2 had introduced himself as being the police and that the Accused thereafter ran away pursued by PW3 and PW8. One reason for rejecting the Accused contention that he was not at the places where PW2, PW3 and PW8 said he was but at the bus stop to catch a bus is the inherent improbability that he would go to the bus stop to catch a bus knowing very well he had no money with him. Equally inherently improbable was his allegation that his friend Boy was also at the bus stop to catch a bus and who also had no money for the bus fare. For the same reason it could not therefore be true that he was waiting for Boy to return to the bus stop with the money for the fares. It follows that the Accused was running away not from the bus stop but from the place described by the witnesses PW2, PW3 and PW8 and after he had thrown the briefcase containing the cannabis away. The Accused was at the relevant time not at the bus stop but at the place described by the prosecution witnesses PW2, PW3 and PW8 and he was running away because of the briefcase and not because he had heard the shout of: "Tangkap pas". Furthermore, the Accused had said he did not understand Bahasa Malaysia so he could not have understood what "tangkap pas" meant let alone ran because of that being said. I also find that the Accused was not caught because he stopped to put on a shoe, which became unstuck; it being incredible that the Accused supposedly at that time running for his dear life would stop to put on a shoe.

Even though I disbelieve the Accused, I will now proceed to see whether any doubt, on a

balance of probabilities, had been created by the Accused evidence and this exercise includes consideration of whether the presumptions of possession, knowledge and trafficking had been rebutted. Particular reference will be made to the evidence of the Accused in relation to the events after his arrest, and which evidence were not challenged by the prosecution, to see whether any doubt has been created.

V. *Whether Reasonable Doubt & Presumptions Rebutted.*

The evidence of the Accused which were, except for the alleged beatings, not challenged are quoted in full here:

> ...That night at 7.00 p.m. PW3 took me to the first floor of the police station. They asked me again as to who owns the briefcase. I replied that I do not know. They hit me again. PW3 took a rotan and hit the back of my head. I do not know why PW3 hit me. PW3 and 6 others took me to Kampung Icebox. I do not know why they took me to Kampung Icebox. They took me to a place on the other side of the location shown on P10(a) where my house was. PW3 and 6 others searched my house. They did not find anything in my house. They hit me again in my house. They then asked me whether I have any friend. I replied I do not have any other friend other than Boy. They asked me again as to whom the briefcase belongs to. I replied I do not know. PW3 pointed a pistol at my head. PW3 said to me why do not want to tell them who owns the briefcase. I told PW3 that I cannot tell him anything because I did not know who owned the briefcase. I was taken back to the police station. One Inspector Alousius took a statement from me. The statement was taken from me 5 days after my arrest. The Inspector hit me at the time of taking the statement. Inspector Alousius asked me to say that the briefcase belonged to me. I answered by saying do not know anything about the briefcase. Inspector Alousius then said to me that if I do not admit the brief case belong to me he will put me in the refrigerator. After Inspector Alousius had taken my statement he put me in the lock-up. I was later sent to the prison where I remained until today...

The Accused had earlier on denied being on the catwalk, denied carrying the briefcase, denied throwing the briefcase away and had denied knowledge of the cannabis inside the briefcase.

Do those evidence create a doubt as to whether the Accused knew the briefcase contained cannabis ? PW2 and PW8 made no mention of going back to the house of the Accused on the night of that day. PW3 admitted in cross-examination to going back to look for the house of the Accused but he said, incredibly, the house could not be found. When the Accused gave evidence, which I have just reproduced, as to the visit to his house and as to what happened there, the evidence was not challenged at all. The policemen, including Inspector Alousius, after the arrest of the Accused, kept asking the Accused as to who owns the briefcase. This makes me ask why the police had to go to the house of the Accused and why they have to determine the ownership of the briefcase when, after all, the Accused was supposed to have been seen carrying the briefcase. This unchallenged evidence of the Accused tends to suggest, and a probability exists, that the Accused did not own the briefcase and hence the need by the police to establish the identity of the owner of the briefcase through persistent questioning of the Accused. This is even more plausible because, another suspect called Sangeluddin Tambausong, who was probably one of the two persons who ran away and not caught then, was arrested on 13 October 1986, which suggests an on-going investigation to establish the ownership of the briefcase that contained the cannabis. But does this suggest or support the probability that the Accused may not know that there was cannabis inside the briefcase? The mere fact that someone else owns the briefcase does not necessarily mean that the Accused may not know what was in the briefcase. In this case, there is no direct evidence that the Accused knew there was cannabis inside the briefcase. The knowledge was presumed because the Accused was seen to have custody or control of the briefcase containing the cannabis. The fact alone of the Accused running away, in the circumstances of this case, cannot justify the inference that the Accused knew cannabis was inside the briefcase because, after all, two other persons also ran even though they were not carrying anything. What then of the fact that the Accused threw the briefcase away when confronted by the policemen? This fact, I am of the view, clearly indicates that the Accused was trying to rid himself of something which

he knew was going to incriminate him. When this is considered together with the fact that the Accused ran away after throwing the briefcase away, it is clear beyond doubt that the Accused knew what was inside the briefcase. Therefore, the fact that probably someone else owns the briefcase did not cast any doubt on the fact that the Accused knew the briefcase contained cannabis. Just because someone else owns the briefcase does not mean that no one else, apart from the owner, knew what was inside the briefcase. Anyone who handled the briefcase could know what was inside the briefcase; more so, when the briefcase was not locked at all. Therefore, the unchallenged evidence of the Accused did not rebut the presumption of knowledge nor did they raise any doubt as to the fact that the Accused knew there was cannabis inside the briefcase. Those evidence also did not cast any doubt as to the fact that the Accused was seen carrying the briefcase and thus had custody or control, which in turn gave rise to the presumption of possession. This presumption had not been rebutted. The Accused merely denied being on the catwalk, denied carrying the briefcase containing the cannabis and denied throwing the briefcase away; all of which I did not accept. Nothing more was offered by the Accused to cast doubt on the fact that he was seen carrying the briefcase containing the cannabis. Therefore, the presumption of possession was not rebutted. Here again, the fact that he may not be the owner of the briefcase does not mean that he could not have carried the briefcase. As for the presumption of trafficking, the Accused did not offer any evidence to challenge the finding of PW1 that there was more than 200 grammes of cannabis. The presumption of trafficking had also not been rebutted.

V. *The Verdict.*

Given my conclusions above, I find the Accused guilty, under s. 39B(l)(a) of the Dangerous Drugs Act, 1952, of the offence of trafficking in 697.41 grammes of cannabis on 6 October 1986 at 2.30 p.m. at Kampung Titingan, Tawau, in the State of Sabah. I will now consider the question of the age of the Accused which age determines the sentence that can be passed.

VI. *The Age & The Sentence.*

PW2 testified that he was told that the Accused was 22 years old and this information he reduced into writing in a police report (Exhibit P9(a)). A prison warden Sinong Malundun ("PW9") was also called by the prosecution and he testified that he on 21 October 1986 received into the Tawau prison the Accused and that at that time he asked the Accused and was told by the Accused, *inter alia*, that the Accused age was 23. This information, PW9 reduced into writing in a book called Rekod Banduan (Exhibit P13). The Accused gave "evidence" that he was born in 1964 and that was told to him by his mother a long time ago. It was upon those "facts" that the arguments were pivoted. The learned DPP argued that the entry of the statement the Accused gave to PW9 as to his age in the Rekod Banduan (Exhibit P13), being a record required to be kept by r. 136 of the Sabah Prisons Regulations, 1958, is relevant within the meaning of s. 35 of the Evidence Act, 1950, which section, for ease of reference, is reproduced here:

> An entry in any public or other official book, register or record, stating a fact in issue or relevant fact and made by a public servant in the discharge of his official duty or by any person in performance of a duty specially enjoined by the law of the country in which the book, register or record is kept, is itself a relevant fact.

Since, according to the learned DPP, it is an entry within the meaning of s. 35 of the Evidence Act, 1950, the entry is admissible to prove that the Accused age was 23 in 1986. The Court was further referred to the judgment of Abdoolcader FJ, at p. 272, in the case of *Dato Mokhtar bin Hashim v. PP* [1983] 2 MLJ 232. It is my opinion that even if the entry in the Rekod Banduan as to the age of the accused could be admitted under s. 35 of the Evidence Act, 1950, the prosecution still has to prove the truth of the entry, that is, that the Accused was in fact 23 years old at the time of his admission to the prison on the 21 October 1986 as recorded in the Rekod Banduan. Mere entry of the age does not establish the truth or otherwise of the allegation regarding the age of the Accused. See **Mohan on the Law of Evidence in Malaysia** at p. 206 and the case, referred therein, of *Tan Khay Seng v. Tan Kay Choon & Anor.* [1990] 1 MLJ 51. The entry as to age in the Rekod Banduan was a result of an answer given by the Accused. The Accused statement as to his age is only hearsay

evidence of his age. See *PP v. Boy bin Islais* [1993] 1 AMR 19:766, at p.777. Hearsay evidence can never be regarded as evidence establishing the truth of the entry in the Rekod Banduan that the Accused was 23 years old. The prosecution therefore must, irrespective of s. 35 of the Evidence Act, 1950, still prove the age of the Accused and s. 35 of the Evidence Act, 1950, is of no help to the prosecution.

The learned DPP next argued that the Accused was estopped by his own statement from disputing that he was 23 years old in 1986 and the case of *Commissioner of the Municipality of Malacca v. Sinniah* [1974] 1 MLJ 77 was cited as supporting that proposition. It is to be noted that the police report (Exhibit P9(a)) states the Accused age to be 22 years while PW9 testified that he was told by the Accused that his age was 23 years. No date nor month of birth was ever mentioned. Such is the unsatisfactory nature of the "evidence" regarding the age of the Accused. As for the *Commissioner of the Municipality of Malacca* case, I am of the opinion that it has no relevance in a criminal case because principles of estoppel have no place in criminal law. That case concerns the representation made by a person that he is of a certain age in order to gain employment and the Court in that case held that he cannot be heard to say, when his retirement on account of his attaining a certain age was due, to say he was younger than what he had stated when he first applied for the job; he was estopped. That was a civil case and has no application to criminal cases. The principle of estoppel was in the case of *PP v. Lee Siew Ngock* [1966] 1 MLJ 225, per MacIntyre J, at p. 229, held to apply to criminal cases but it was only in respect of the principle of issue estoppel. If there is any doubt that estoppel has no application to criminal proceedings, one has only, to dispel the doubt, to refer to **Sarkar on Evidence,** 13th Edn. at p. 1078 where it is said:

> Estoppel is a rule of civil actions. It has no application to criminal proceedings, though in such proceedings matters which in civil actions create an estoppel are usually so cogent that it would be almost useless to set up a different story [Powell 9th Ed p 449]. The principle of estoppel has no place in criminal law [*Maharam v. R*, 40 A393; 45 IC 51].

It was further argued that since there was evidence adduced as to the age of the Accused, it is for the Accused to rebut the same and the learned DPP cited the case of *John Anak Liman & Anor. v. PP* [1968] 2 MLJ 236. If by "evidence" the learned DPP should refer to the statement made to PW2, then such statement is not evidence because it is not admissible as it was made by the Accused to PW2 after his arrest and made without the statutory caution; if it was meant to refer to the statement made by the Accused to PW9, it is also not evidence of the age because what the accused said about his age was only hearsay and it could not be evidence. Therefore, there was no evidence as to the age of the Accused which the Accused had to rebut. *John Anak Liman & Anor.* case presupposes the existence of some evidence as to age which is not present in this case. In the present case the Accused himself testified, and truthfully if I may add, that he does not know when he was born and that he was told by his mother that he was born in 1964. The statements of PW2, PW9 and the Accused as to the age of the Accused were all hearsay and hence, cannot be evidence of age which require rebuttal.

The final argument of the learned DPP is that since the charge sheet states the Accused to be 23 years old the accused must be taken to have been proven to be 23 years old by the mere fact of the statement in the charge sheet that the Accused was 23 years old because, according to the learned DPP, s. 114(e) of the Evidence Act, 1950, presumes the act, that is the act of stating the said age, to have been regularly performed. The Court was referred by the learned DPP to the case of *Ong Lai Kim & 2 Ors. v. PP* [1991] 2 CLJ 1568. That case concerns an appeal against a rape and robbery conviction and whether a sentence of light rotan or whipping should be imposed. In the course of the hearing, Dato' Dr. Zakaria Mohd. Yatim J was urged to revise the sentence of light rotan (which under s. 288(iv) of the Criminal Procedure Code is for youthful offender (i.e. offender of between the age of 10 and 16 years)) imposed on the 1st appellant and instead replace it with whipping on the ground that the said appellant was at the date of offence 17 years old. It was argued in that case by Counsel for the said appellant that there was "no direct evidence to show" the

said appellant was not a youthful offender. The said learned Judge appears not to have accepted that argument and said:

> In my opinion, the age of the first appellant can be determined from the charge sheet and his probation report. See s. 114(e) of the Evidence Act. The probation report was not challenged by the first appellant. Since the first appellant was an adult at the time the offences were committed, under s. 173(m)(2) the sentence passed against him must be according to law...

I respectfully decline to follow the proposition, which that case appears to lay down, that the statement of age stated in the charge sheet and the probation report is evidence of age. In the first place, no reason was given for rejecting the argument that there was no direct evidence as to age. The other reason why I respectfully decline to follow that case is that the statements as to age in the charge sheet and in the probation report are surely hearsay and cannot be evidence or proof of age. See *PP v. Boy Bin Islais Case.*

The age of a person as at the time of examination can be determined with a reasonable degree of certainty by inspection, physical and radiological, by a physician specialist, as was done in the reported case of *PP v. Nur Hassan Bin Salip Hashim & Anor.* [1993] 2 CLJ 551. There is no reason why this was not done in this case when there was no birth certificate to prove the age of the Accused. I cannot say by looking at the Accused that he could not be below 18 years old at the time he committed the offence. Therefore a doubt exists as to the true age of the Accused.

Given my decisions above and in accordance with s. 16 of the Juvenile Courts Act, 1947, I order the Accused to be detained during the pleasure of His Excellency, the Yang Di-Pertua Negeri Sabah.

VII. *Disposal of Exhibits.*

The cannabis shall be destroyed by burning in the presence of the Senior Assistant Registrar of the High Court in Tawau and in the compound of the Court. The destruction shall only be carried out after the disposal of any appeal against the decision herein or, if there be no appeal, after the expiry of the time limited for appeal. Exhibit P9(a) and Exhibit P13 are to be returned, respectively, to the police and the prison authority, and, likewise, only to be returned after the said period.